Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL FILE

In the Matter of	)	
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	

To the Commission

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Federal Communications Commission
Office of the Secretary

TIME-SENSITIVE MOTION FOR STAY

The National Association for the Advancement of Colored People ("NAACP"), the League of United Latin American Citizens ("LULAC") and the National Black Media Coalition ("NBMC") ("Civil Rights Organizations") respectfully move for a stay of the procedural dates in response to the NPRM in this proceeding, FCC 92-98 (released April 10, 1992) ("Comparative Hearing Policies NPRM") until the Commission revises the Comparative Hearing Policies NPRM to conform with its ruling in Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases (MO&O) ("Comparative Hearing Procedures MO&O"), 6 FCC Rcd 3403, 3406 ¶33 (1991).

In the Comparative Hearing Procedures MO&O, the Commission announced that it would treat various proposals to revise the comparative criteria, filed by the Civil Rights Organizations, and a counterproposal by Jeffrey Rochlis, as a petition for rulemaking. Id. The Civil Rights Organizations proposals sought:

(1) to permit interests held by Minority Enterprise Small Business Investment Companies to be treated as nonattributable;

(2) to expand broadcast experience credit to include comparable management experience;

(3) to revise the minority sensitivity credit, making it available in any proceeding, not just to counter a minority ownership credit; and

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(4) to award comparative credit to applicants that have divested an FM or VHF TV station to minorities for no more than 75% of fair market value.

See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases (Report and Order) 6 FCC Rcd 157, 164 ¶52 (1990) ("Comparative Hearing Procedures R&O").

Mr. Rochlis' proposal was to create a "finders preference." Id. Its practical effect would be to completely neutralize and nullify the minority preference. Since nearly all new FM and TV proceedings include a "finder" as an applicant, a minority preference would be esentially without value in every comparative hearing. If implemented, the finders preference would significantly reduce the economic incentives for minorities, or minority-sensitive nonminorities, to apply for broadcast permits and avail themselves of the above-described policies recommended by the Civil Rights Organizations. Minorities and minority-sensitive nonminorities would hardly be as eager to undergo the risk and torture inherent in a comparative hearing knowing that the "finder", regardless of who he is, will have a preference whose effect is to nullify the impact of a minority preference.

The Rochlis proposal would also nullify any incentive for nonminorities to divest stations to minorities for less than fair market value as contemplated by the Civil Rights Organizations' proposals. Such a minority-sensitive nonminority, once in a comparative hearing, would have his sensitivity credit automatically cancelled out by another applicant's "finders" preference. Thus, few if any sales of stations to minorities under the incentive plan proposed by the Civil Rights Organizations would occur.

Therefore, the Rochlis proposal and the Civil Rights Organizations' proposals are mutually exclusive. Adoption of the Rochlis proposal would render the Civil Rights Organizations' proposals essentially moot, and signal the death knell for minority ownership through the comparative hearing process.

The Rochlis proposal was assigned RM-7740 and put out for public comment in the Comparative Hearing Policies NPRM. The Civil Rights Organizations' proposals were ignored. A thorough discussion of this procedural error by the Commission, and its effect on the procedural due process owed to the Civil Rights Organizations, is contained in their "Motion to Amend Notice of Proposed Rulemaking and Reschedule Procedural Dates" filed this date and appended hereto as Exhibit 1 and incorporated by reference herein. The Civil Rights Organizations' Petition for Reconsideration, or in the Alternative Petition for Rulemaking in MM Docket No. 90-264 (filed January 22, 1991 and containing proposals originally filed in MM Docket No, 90-264 on September 14, 1990) is referred to herein as the Reconsideration/Rulemaking Petition; it is appended hereto as Exhibit 2.

The Civil Rights Organizations were entitled to have their substantive hearing reform proposals included in the Comparative Hearing Procedures NPRM just as was Mr. Rochlis. They were entitled to be included in RM-7740 or to receive their own "RM" number, just as did Mr. Rochlis. Their proposals could not be more germane to this proceeding, and more diametrically opposed to the direction Mr. Rochlis' proposal would take us -- toward a complete nullification of the minority preference in comparative hearings.

As the Civil Rights Organizations point out in their "Motion to Amend Notice of Proposed Rulemaking and Reschedule Procedural Dates" filed today, consideration of the anti-minority Rochlis proposal -- especially if undertaken without parallel consideration of pro-minority initiatives such as those recommended by the Civil Rights Organizations -- would so seriously dilute the minority preference as to fall well afoul of Pub. L. 102-140 (adopted October 28, 1991).1/ Consideration of the Rochlis proposal along with the Civil Rights organizations' proposals might reflect the "balanced" approach approved by the Second Circuit in NBMC v. FCC, 882 F.2d 277, 63 RR2d 1, 5 (2d Cir. 1988) (approving the daytimer preference because it "balances" the minority preference).

The Commission may not proceed further with a rulemaking proceeding which so plainly violates the intent of Congress. The proper remedy when the Commission violates its own previous directives and violates an Act of Congress is the issuance of an immediate stay of the proceedings until the Commission's error is corrected.

A stay must be granted where (1) it is likely that the party seeking the stay will prevail on the merits; (2) the petitioner will incur irreparable injury in the absence of a stay; (3) it is unlikely that granting a stay would be harmful to other parties; and (4) granting a stay would serve the public interest.

1/ This appropriations measure, enacted annually since 1987, specifies that "none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing...to expand minority and women ownership of broadcasting licenses[.]"

Virginia Petroleum Jobbers v. FPC, 259 F.2d 921 (D.C. Cir. 1959) as modified by Washington Metropolitan Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); see Cannon Communications Corporation, 6 FCC Rcd 3310, 3311 (1991).

The Civil Rights Organizations have met each element of the test for a grant of a stay.

(1) Likelihood of Prevailing on the Merits. The Civil Rights Organizations were plainly afforded far less due process than was Mr. Rochlis. This happened because the Commission vacated, sub silentio, its own command to treat both the Rochlis and Civil Rights Organizations' proposals jointly as a petition for rulemaking. Comparative Hearing Procedures MO&O, 6 FCC Rcd at 3406 ¶33. It is fundamental that an agency may not reverse itself without providing a reasoned explanation for doing so. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). Nor may an agency irrationally prefer one litigant over another. If there is one absolute article of faith in administrative procedure, it is that similarly situated parties must be treated equally. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945); cf. NBC v. U.S., 319 U.S. 190, 226 (1943) ("Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis.") Whether before the Commission or on appeal, the Civil Rights Organizations are highly likely to win the right to full notice and comment opportunities on their proposals, along with the right to file replies to opposing comments.

Furthermore, the Commission is duty bound not to violate an Act of Congress, Pub. L. 102-140 (October 28, 1991). By proposing an anti-minority "finders preference" which would precisely neutralize a minority preference, the Commission has intruded on the firm determination of Congress that the minority preference may not be diluted or nullified. The fact that such dilution would occur through the backdoor vehicle of a "finders preference" rather than through direct repeal of the minority preference is irrelevant.

(2) Petitioner's irreparable injury in the absence of a stay. Absent a stay, the first occasion those interested in this docket will have to read, evaluate and formally comment upon the Civil Rights Organizations' proposals will be in their reply comments. Absent a stay, the Civil Rights Organizations will have no opportunity to defend or refine their proposals in light of the comments of opposing parties. Mr. Rochlis will have had two opportunities to respond to the criticisms of opponents -- the occasion of his receipt of an "RM" number, and in his reply pleading in this docket. Consequently, absent a stay, the Civil Rights Organizations will not have a full opportunity to develop a complete record on their proposals. As a result, the Commission may adopt fundamental changes in its comparative hearing policies -- adversely to the interests of the Civil Rights Organizations and their members and constituents -- and implement those changes. The appeal and remand process often consumes one or two years and might not be accompanied by a stay of any new policies or substantive rules adverse to minorities. Therefore, the Civil Rights Organizations' members and constituents would find themselves discouraged from entry into broadcasting for a considerable length

of time as a direct consequence of the Commission's procedural error in failing to include the Civil Rights Organizations' proposals in RM-7740 or to assign those proposals their own "RM" number. Since the Commission typically issues 50-100 new broadcast construction permits in a year, the injury sustained by the Civil Rights Organizations as a result of insufficient due process and unequal treatment today will manifest itself in grants of perhaps dozens of construction permits to nonminorities which otherwise could have been granted to minorities. Since the Commission never revokes grants of construction permits as a result of its procedural errors in the rulemaking process, those construction permits will mature into licenses for operating stations. Those radio stations will fail to promote diversity of information to the extent that minority owned stations would have promoted diversity of information. The resulting loss of potential diverse sources of information would substantially and irreparably harm the radio and television consumers represented by the Civil Rights Organizations.

(3) **Likelihood that granting a stay would be harmful to other parties.** A stay would merely have the effect of postponing the comment and reply comment dates in this proceeding by a few weeks while the Commission issues a supplemental NPRM calling for comment on the Civil Rights Organizations' proposals. No party has a legitimate interest in not having the Civil Rights Organizations' proposals included among the subjects upon which the Commission seeks comment. There is no legitimate governmental interest in giving Mr. Rochlis more procedural due process than is given the Civil Rights Organizations. No party, then, can be materially harmed by the very brief stay sought here.

(4) How granting a stay would affect the public interest. A stay would broaden the options to be considered by the public. It would result in the inclusion, among the objects of public comment, of proposals which Commissioners Quello and Barrett felt worthy of a full public airing in this proceeding. See Comparative Hearing Procedures R&O, 6 FCC Rcd at 172-173 (Separate Statement of Commissioner Quello); Comparative Hearing Procedures MO&O, 6 FCC Rcd at 3410 (Separate Statement of Commissioner Barrett). It would permit the Commission to evaluate the extent to which Mr. Rochlis' proposal would impact on the prospects for minority ownership, and on the likely effectiveness of the mutually exclusive proposals of the Civil Rights Organizations. Finally, a stay to correct so obvious an error as the sub silentio vacating of the Commission's own directive in ¶33 of its Comparative Hearing Procedures MO&O is far more efficient and less time consuming than having to start all over again next year after a remand from the Court of Appeals. Consideration of both pro-minority and anti-minority proposals simultaneously will not only promote administrative efficiency and produce a more thorough record, it will diminish the likelihood of a forced reexamination on remand of the entire docket. See Bechtel v. FCC, ___ F.2d ___, 70 RR2d 397, 402 (D.C. Cir. 1992). The benefits of full and robust consideration of pro-minority ownership initiatives would "redound to all members of the viewing and listening audience." Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997, 3011 (1990).

The Civil Rights Organizations have met the requirements for granting a stay. The Comparative Hearing Policies NPRM should be amended or revised to specifically seek comment on the proposals advanced by the Civil Rights Organizations in September, 1990.

Revised comment dates should be established accordingly, to allow all potential commenters a reasonable time to familiarize themselves with the Civil Rights Organizations' proposals.2/

Respectfully submitted,

David Honig
Trustee
Minority Media Ownership
Litigation Fund
1800 N.W. 187th Street
Miami, Florida 33056
(305) 628-3600

Dennis Courtland Hayes
General Counsel
Everald Thompson
Assistant General Counsel
NAACP
4805 Mt. Hope Drive
Baltimore, Maryland 21215
(301) 486-9193

Eduardo Pena
1101 14th Street N.W.
Suite 610
Washington, D.C. 20005
(202) 371-1555

Squire Padgett
1835 K Street N.W.
Suite 900
Washington, D.C. 20006
(202) 296-2266

Counsel for the National Association for the Advancement of Colored People, the League of United Latin American Citizens, and the National Black Media Coalition

May 1, 1992

2/ The Civil Rights Organizations regret that this Motion is being filed two weeks into the six week comment cycle. They would have filed it immediately after issuance of the Comparative Hearing Policies NPRM but for the fact that its preparation was interrupted by an apparent heart attack of lead counsel.

EXHIBIT 1

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MOTION TO AMEND NOTICE OF PROPOSED RULEMAKING AND RESCHEDULE PROCEDURAL DATES

David Honig
Trustee
Minority Media Ownership
Litigation Fund
1800 N.W. 187th Street
Miami, Florida 33056
(305) 628-3600

Dennis Courtland Hayes
General Counsel
Everald Thompson
Assistant General Counsel
NAACP
4805 Mt. Hope Drive
Baltimore, Maryland 21215
(301) 486-9193

Eduardo Pena
1101 14th Street N.W.
Suite 610
Washington, D.C. 20005
(202) 371-1555

Squire Padgett
1835 K Street N.W.
Suite 900
Washington, D.C. 20006
(202) 296-2266

Counsel for the National Association for the Advancement of Colored People, the League of United Latin American Citizens, and the National Black Media Coalition

May 1, 1992

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SUMMARY

Four major national organizations, representing over 750,000 people, have had numerous twelve rulemaking proposals sitting on the shelf at the FCC since September, 1990. Four of those proposals relate to comparative hearing preferences and are therefore germane to this docket. In MM Docket 90-264 (Comparative Hearing Procedures), the Commission declared that it would treat these four proposals, together with an anti-minority counterproposal filed by Jeffrey Rochlis, as a petition for rulemaking. Within two months, the Commission had assigned RM-7740 to Rochlis' counterproposal, and given "RM" numbers to two other anti-minority proposals affecting comparative hearings. The Commission neither included the Civil Rights Organizations' proposals in RM-7740 nor assigned a separate "RM" number to the Civil Rights Organizations' proposals.

In the instant NPRM, the Commission has called for comment on the Rochlis proposal but has not even mentioned the existence of the Civil Rights Organizations' proposals. Nor did the instant NPRM, which all but endorsed the Rochlis proposal, note that the Civil Rights Organizations had opposed finders preferences.

These Commission errors and omissions cap two decades of studied ignorance, delays, and pocket vetos of rulemaking proposals filed by minority organizations. Nonminorities' rulemaking proposals are routinely given "RM" numbers immediately and put out for comment.

The Commission must begin to treat all rulemaking participants equally. To accomplish this, it should issue a supplemental NPRM seeking comment on the Civil Rights Organizations' proposals, and extend the comment dates accordingly.

A Time-Sensitive Motion for Stay, filed contemporaneously with this Motion, asks the Commission to proceed no further with this docket until all process due the Civil Rights Organizations has been provided to them.

* * * * *

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MOTION TO AMEND NOTICE OF PROPOSED RULEMAKING AND RESCHEDULE PROCEDURAL DATES

The National Association for the Advancement of Colored People ("NAACP"), the League of United Latin American Citizens ("LULAC") and the National Black Media Coalition ("NBMC") ("Civil Rights Organizations") respectfully move to amend the Notice of Proposed Rulemaking in the Matter of Reexamination of the Policy Statement on Comparative Broadcast Hearings, FCC 92-98 (released April 10, 1992) ("Comparative Hearing Policies NPRM") to include a request for comment on comparative hearing policy proposals filed September 14, 1990 and refiled January 22, 1991 by the Civil Rights Organizations.

This Motion seeks to place the substantive proposals of the Civil Rights Organizations on the same procedural footing as the Commission has placed various anti-minority proposals for which it seeks comments in response to the Comparative Hearing Policies NPRM. As shown herein, the Comparative Hearing Policies NPRM violates fundamental principles of procedural due process and equal protection, and vacates, sub silentio, the Commission's own previous assurance that it would afford the Civil Rights Organizations' substantive proposals the same procedural relief as that afforded to anti-minority substantive proposals.

In order to facilitate the effectuation of the relief sought in this Motion, the Civil Rights Organizations are simultaneously filing a Motion for Stay of the procedural dates in this docket.

BACKGROUND

On September 14, 1990, the Civil Rights Organizations timely filed Comments on the NPRM in MM Docket No. 90-264, Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 5 FCC Rcd 4050 (1990) ("Comparative Hearing Procedures NPRM"). The Civil Rights Organizations' Comments in response to the Comparative Hearing Procedures NPRM are correctly characterized as follows in Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases (Report and Order) 6 FCC Rcd 157, 164 ¶52 (1990) ("Comparative Hearing Procedures R&O"):

> A number of commenters submitted proposals to change the policies under which the Commission awards comparative credits and demerits in comparative broadcast proceedings...The NAACP [actually, the Civil Rights Organizations] suggests that interests held by Minority Enterprise Small Business Investment Companies not be attributable; that we expand broadcast experience credit to include comparable management experience; revise the minority sensitivity credit, making it available in any proceeding, not just to counter a minority ownership credit; and award comparative credit to applicants that have divested an FM or VHF TV station to minorities for no more than 75% of fair market value. These proposals were not raised in the Notice, and they are beyond the scope of this proceeding which focuses, for the most part, on the procedures employed in broadcast comparative cases rather than the comparative criteria used to evaluate the applicants.

Commissioner Quello issued a Separate Statement accompanying the Comparative Hearing Procedures R&O, specifically citing to the Civil Rights Organizations Comments. He sought to

> direct the Commission's attention to certain issues raised by commenters that were outside the scope of the instant proceeding. Specifically, several commenters advocated changing the policies for assigning comparative merits and demerits [citing the Civil Rights Organizations' and Radio New Jersey's Comments.]...We should not shelve the idea of reevaluating our comparative criteria. I think the Commission should initiate a new rulemaking proceeding to reexamine some of our policies for evaluating competing applications. Some of the proposals submitted in this proceeding might provide a good point of departure for such an analysis.

Id. at 172-173.

On January 22, 1991 the Civil Rights Organizations sought reconsideration of the Comparative Hearing Procedures R&O in a filing styled "Petition for Reconsideration, or in the Alternative Petition for Rulemaking" ("Reconsideration/Rulemaking Petition"). Therein, the Civil Rights Organizations requested the Commission to either rule on the merits of their proposals or "treat this filing as a Petition for Rulemaking and assign it an 'RM' number pursuant to 47 CFR §1.403 ('all petitions for rulemaking...will be given a file number, and promptly thereafter, a "public notice' will be given.')" Reconsideration/Rulemaking Petition, January 22, 1991, at 1.

The Reconsideration/Rulemaking Petition argued that the scope of the Comparative Hearing Procedures NPRM was extremely broad and open-ended, and that an adjustment to the Anax policy made in the Comparative Hearing Procedures R&O showed that the intent of the Comparative Hearing Procedures NPRM was to address

substantive as well as procedural questions involving comparative hearings. See Reconsideration/Rulemaking Petition at 2; Comparative Hearing Procedures NPRM, 5 FCC Rcd at 4055 ¶45. The Civil Rights Organizations requested that if on reconsideration the Civil Rights Organizations' proposals to reform the comparative hearing process were again found to be outside the scope of the Comparative Hearing Procedures NPRM, then those proposals should be assigned an "RM" number and put out for comment.

On March 8, 1991, Jeffrey Rochlis filed the only Comment on the Reconsideration/Rulemaking Petition. Mr. Rochlis urged that his proposal for a "finders preference", which like the Civil Rights Organizations' proposals would substantively revise the comparative criteria, also should be put out for comment.

The practical effect of Mr. Rochlis' proposal would be to neutralize and nullify the minority preference, and thus run directly substantively counter to the substantive goals of the Civil Rights Organizations' proposals.1/ If implemented, it would

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1/ In calling for comment on the Rochlis proposal, the Comparative Hearing Policies NPRM suggests that the "finders preference" will somehow benefit minorities because its proponents came up with two instances in which minorities happened to be the "finders." Id. at 14-15 ¶29. Such an inference is illogical. The Commission must know that nearly all "finders" are nonminorities. This should come as no surprise. Being a "finder" entails engineering and legal costs above and beyond those of prosecuting an application for a construction permit. Minorities often lack access to capital. Minority Ownership in Broadcasting, 92 FCC2d 859 (1982). Thus, many minorities would find the search for a "drop-in" to be a luxury. "Finders" are not always highly motivated to use broadcast licenses to provide diverse new voices to their communities: they are quite often the local stand-ins for engineering firms who contact their old-boy network "finders" when they perceive that a potential new allotment can be engineered into the TV or FM Table of Allotments.

(n. 1 continued on p. 5)

significantly reduce the economic incentives for minorities, or minority-sensitive nonminorities, to apply for broadcast permits and avail themselves of the above-described policies recommended by the Civil Rights Organizations. Since nearly all new FM and TV proceedings include a "finder" as an applicant, a minority preference would be esentially without value in every comparative hearing. Minorities and minority-sensitive nonminorities would hardly be as eager to undergo the risk and torture inherent in a comparative hearing knowing that the "finder", regardless of who he is, will have a preference whose effect is to nullify the impact of a minority preference.

The Rochlis proposal would also nullify any incentive for nonminorities to divest stations to minorities for less than fair market value as contemplated by the Civil Rights Organizations' proposals. Such a minority-sensitive nonminority, once in a comparative hearing, would have his sensitivity credit automatically cancelled out by another applicant's "finders" preference. Thus, few if any sales of stations to minorities under the incentive plan proposed by the Civil Rights Organizations would occur.

1/ (continued from p. 4)

Official notice may be taken that of over 150 communications consulting engineers practicing fulltime before the FCC today, only one is Black and one is Hispanic. No evidence whatsoever shows that "finders" have been more community-responsive broadcasters than non-finders, although extensive evidence shows that minorities tend to be extraordinarly community-responsive broadcasters. See Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997 (1990).

Therefore, the Rochlis proposal and the Civil Rights Organizations' proposals are mutually exclusive. Adoption of the Rochlis proposal would render the Civil Rights Organizations' proposals essentially moot, and signal the death knell for minority ownership through the comparative hearing process.

In the comparative hearing procedures docket, the Commission denied reconsideration to the Civil Rights Organizations. Proposals to Reform the Commission's Comparative Hearing Process to Expire the Resolution of Cases (MO&O), 6 FCC Rcd 3403 (1991) ("Comparative Hearing Procedures MO&O"). Therein the Commission correctly observed that the Civil Rights Organizations had filed their proposals in response to the Comparative Hearing Procedures NPRM, and "in the alternative" ask that "its filing be treated as a petition for Rule Making." Id. at 3405 ¶24. The Commission also discussed Mr. Rochlis' Comments in response to on the Civil Rights Organizations' Reconsideration/Rulemaking Petition at length. Id. at 3405-3406 ¶25. Although the Commission denied the Reconsideration/Rulemaking Petition, it included in the Comparative Hearing Procedures MO&O an ordering clause specifically directing that the Reconsideration/Rulemaking Petition "IS DENIED insofar as it requests reconsideration, but that pleading and the comments thereon filed by Jeffrey Rochlis will be treated as a petition for rulemaking." Id. at 3406 ¶33 (emphasis on the singular preposition "a" supplied).

Further underscoring the desirability of robust rulemaking comment on the Civil Rights Organizations' substantive proposals was Commissioner Barrett's Separate Statement to the Comparative Hearing Procedures MO&O, 6 FCC Rcd at 3410. Commissioner Barrett wrote in pertinent part:

> While I understand that this docket dealt primarily with procedural reform issues, I also am concerned with the comparative criteria proposals that were not addressed in this docket, but saved for a later day [citing the discussion in the Comparative Hearing Procedures MO&O, 6 FCC Rcd at 3406 ¶¶26-28, relating to the Civil Rights Organizations' and Rochlis' petitions]....I am uncomfortable with pushing such issues aside without further analysis or, as a minimum, establishing a definitive plan for further review and analysis of such proposals.

Mr. Rochlis' Comments on the Civil Rights Organizations' proposals were "treated as a petition for rulemaking" and assigned the file number RM-7740 on June 24, 1991. See Policy Statement NPRM at 14 n. 14. On the same day, similar "finders preference" proposals by Gerald Proctor and Larry Fuss were assigned "RM" numbers (RM-7739 and RM-7741 respectively).

Yet despite the explicit ordering clause (¶33 of the Comparative Hearing Procedures MO&O) directing that the Civil Rights Organizations and Mr. Rochlis' proposals "will be treated as a Petition for Rule Making" (emphasis supplied), the Civil Rights Organizations' proposals were not encompassed within the RM number given to Mr. Rochlis -- himself a mere commenter on the Civil Rights Organizations' proposals. Nor were the Civil Rights Organizations proposals assigned an "RM" number. Moreover, at no place in the Comparative Hearing Policies NPRM is the Civil Rights Organizations' proposals even mentioned. Even in the discussion of broadcast experience and of the minority preference -- which the Civil Rights Organizations' proposals specifically sought to broaden -- the Civil Rights Organizations proposals are nowhere mentioned. Id. at 16-17 ¶36. They might as well never have been filed.

On top of that, the fact that the Civil Rights Organizations vigorously opposed the finders preference was nowhere mentioned in the Comparative Hearing Policies NPRM. See "Opposition to Petition for Rulemaking," filed in response to RM-7741 by NAACP, LULAC and NBMC July 24, 1991. Incredibly, the Civil Rights Organizations' opposition to the finders preference was ignored, but Rochlis' response to the Civil Rights Organizations' opposition was considered, along with an ex parte prsentation by Rochlis' counsel. Comparative Hearing Policies NPRM at 14-15 ¶29. The Civil Rights Organizations might as well not have bothered filing their Opposition to the finders preference proposal in RM-7741. Readers of the Comparative Hearing Policies NPRM will thus be misled into believing that the "finders preference" is somehow a pro-minority initiative when it is, in fact, precisely the opposite.2/

ARGUMENT

Perhaps the Commission forgot what it did in ¶33 of the Comparative Hearing Procedures MO&O. By not merging the Civil Rights Organizations' proposals into RM-7740 or assigning them another "RM" number, the Commission has sub silentio vacated the

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2/ See Comparative Hearing Policies NPRM at 14 n. 14 (all but endorsing the Rochlis proposal by remarking that Commission "could have adopted the finders preference pursuant to the outstanding petitions" but nonetheless desired further public comment.)

relief provided in ¶33 of the Comparative Hearing Procedures MO&O.3/

For at least five reasons, the Commission erred by ignoring the Civil Rights Organizations' proposals.

First, the Commission cannot vacate its own order without articulating a reason for doing so. By ignoring the Civil Rights Organizations' proposals while taking up Mr. Rochlis' proposal, the Commission vacated ¶33 of the Comparative Hearing Procedures MO&O sub silentio. The Comparative Hearing Policies NPRM provides no reason for doing so; indeed, it fails even to mention the existence of the Civil Rights Organizations' proposals.

Second, even if the Commission were permitted to vacate, sub silentio, ¶33 of the Comparative Hearing Procedures MO&O, the Commission lacks any rational basis for treating the Civil Rights Organizations' proposals differently from the mutually exclusive Rochlis proposal. The Commission is duty bound to treat all those who come before it equally. See Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945); cf. NBC v. U.S., 319 U.S. 190, 226 (1943) ("Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis.") From a procedural

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3/ The Civil Rights Organizations assume that what the Commission has done is to vacate its own previous order sub silentio, because the only other possible interpretation is that the Commission has deliberately decided not to observe its previous order even while leaving that order in effect. This it could not do. See 47 U.S.C. §416(c) ("[i]t shall be the duty of every person, its agents and employees...to observe and comply with such orders so long as the same shall remain in effect.") The Civil Rights Organizations trust that the Commission would not deliberately violate its own order. Alegria I, Inc. v. FCC, 905 F.2d 471, 474 (D.C. Cir. 1990); Reuters Ltd. v. FCC, 781 F.2d 946, 950-51 (D.C. Cir. 1986).

standpoint, there is absolutely no difference whatsoever between Mr. Rochlis' substantive proposals and the Civil Rights organizations' substantive proposals. By treating the Rochlis and Civil Rights Organizations' proposals differently, the Commission departed without explanation from its own precedents, manifested in its uniform practice of considering mutually exclusive counterproposals simultaneously.4/ By ignoring its own precedents without explanation, the Commission has abused its discretion.

Third, even if Mr. Rochlis had never filed a counterproposal to the Civil Rights Organizations proposals, the Civil Rights Organizations' proposals fall squarely within the scope of the Comparative Hearing Policies NPRM and should logically have been consolidated therein. In this docket, the Commission seeks comment on such matters as eliminating integration credit, eliminating proposed program service credit, and eliminating local residence and civic involvement credit. Each of these proposals could seriously undermine opportunities for minority ownership, inasmuch as minority applicants tend to be more likely than nonminority applicants to be civically involved local residents, to propose 100% fulltime integration, and to offer specialized programming for underserved populations. On the other hand, the Civil Rights Organizations' proposals would significantly improve the outlook

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4/ This practice is most frequently manifested in rulemaking proceedings aimed at amending the Table of FM Allotments, 47 CFR §73.202 and the Table of Television Allotments, 47 CFR §73.606. See, eg., Table of FM Allotments (Carolina Beach et al.), 7 FCC Rcd 544 (1992).

for minority applicants, in furtherance of Congressional intent[5/] and as appropriate in light of the sharp decline in minority wnership in the past year.[6/] The Civil Rights Organizations' proposals are significant alternatives to the Commission's preferred course of action, and thus deserved inclusion in the Comparative Hearing Policies NPRM on their own merits. See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983) ("agency rule would be arbitrary and capricious if the agency...entirely failed to consider an important aspect of the problem"). Whether or not the outcome of the instant proceeding will favor minority applicants, it is likely to substantively affect the "balance" between minority preferences and other preferences which the Commission sought to preserve when it established its "daytimer preference" which generally disfavors minorities. NBMC v. FCC, 882 F.2d 277, 63 RR2d 1, 5 (2d Cir. 1988). The Commission must be cognizant of how events and trends, including those of its own making, may materially affect the outcomes of the comparative hearing process. See Bechtel v. FCC, ___ F.2d ___, 70 RR2d 397, 402 (D.C. Cir. 1992). Bechtel provides all the more reason to consider the Civil

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5/ See Act of October 28, 1991, Pub. L. 102-140 (specifying that "none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing...to expand minority and women ownership of broadcasting licenses[.]"

6/ NTIA's November, 1991 report on Minority Ownership Trends found that the number of minority owned commercial television and radio stations declined from 301 to 287 (from 2.9% to 2.7%) in just one year, even as the total number of stations was increasing. This represents a 4.7% decline in minority ownership in one year -- the first decline in the history of broadcasting.